LIBRARY
SUPREME COURT, U. S.

FILED
JUL 14 1969
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. 339

DANNY ROY SHOEMAKER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-8080

INDEX

Opinion of the Court Below 2

Statutory Provision Sustaining Jurisdiction 2

Question Presented 2

Statutes and Regulations Involved 2

Statement of the Case 2

The Facts 3

Reasons for Granting Writ 7

Argument—

I. Appellant's Unrebutted Prima Facie Case 7

II. Failure of Proof: No Final Physical 8

Conclusion 12

Appendix A, Opinion of the United States Court of Appeals for the Ninth Circuit A1

Appendix B, Order Denying Petition for Rehearing A4

Appendix C, First Amendment and § 456 (j) of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.) A4

Cases Cited

Briggs v. *United States*, 9 Cir., 1968, 397 F.2d 370 11

Dickinson v. *United States*, 74 S. Ct. 152 (1953) 8

Statutes

First Amendment 2

C.F.R.—

Section 1622.1, subsection (b) 9

Section 1622.1, subsection (d) 9

Section 1623.3 ..... 8, 9
Section 1628.10 9
Section 1660.20 10
18 U.S.C. § 3231 2
28 U.S.C. 1254(1) 2
50 U.S.C. App. § 462 2-3
50 U.S.C.A. App. § 456 (j) 2

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. _____

DANNY ROY SHOEMAKER,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of the United States District Court for the Central District of California, convicting the petitioner of a violation of the Universal Military Training and Service Act and sentencing him to the custody of the Attorney General.

1. OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals is not yet reported. It is set forth as Appendix A to this petition.

2. STATUTORY PROVISION SUSTAINING JURISDICTION

The final judgment of the Court of Appeals was entered on June 12, 1969, denial of petition for rehearing. See Appendix B to this petition. This petition for Writ of Certiorari is filed within the required thirty days' time.

The jurisdiction of this Court rests on Section 1254 (1) of the Judicial Code, 28 U.S.C. The District Court had jurisdiction under 18 U.S.C. § 3231.

3. QUESTION PRESENTED

The sole question presented is:

Whether a I-O type Selective Service System registrant is entitled to the same physical inspection as are other selectees ordered for induction.

4. STATUTES AND REGULATIONS INVOLVED

Involved are the First Amendment and § 456 (j), of the Universal Military Training and Service Act of 1951, as amended (50 U.S.C.A. App.). They are set forth in Appendix C. The agency regulations involved are set forth in the Argument.

5. STATEMENT OF THE CASE

The indictment charged petitioner with a violation of the Universal Military Training and Service Act, 50 U.S.C.

App. § 462 (Tr. 2]*; that he became a registrant of Local Board No. 136 of the Selective Service System, State of California and that having theretofore been duly classified in Class I-O, did knowingly refuse and fail to comply with the order of his said Local Board No. 136 to report for and accept the assigned civilian work. [Tr. 1]

Petitioner pleaded not guilty, waived jury trial and was tried on April 8, 1968. [Tr. 25] A written motion for judgment of acquittal was filed, [Tr. 22] The motion was denied and the petitioner was found guilty on April 8, 1968, and thereafter was sentenced and admitted to bail pending appeal. [Tr. 26]

6. THE FACTS

The relevant facts in this appeal are found in (1) the defendants' Selective Service file [Ex. 1-65]* and in (2) the reporter's transcript of the trial [RT 1-25]** both being parts of the designated record on appeal. [Tr. 27]

1. The File.

Defendant showed, at his earliest opportunity (Sept. 24, 1965 in his Classification Questionnaire, Ex. 7) that he was "a formally ordained minister of the Jehovah's witnesses since August 26, 1955."

He amplified his few words, that the space in the form physically permitted, by a page of description. [Ex. 9]

Later, when he was sent the Special Form for Conscientious Objector he gave additional evidence:

*Ex. refers to the government Exhibit #1, the complete SS file of appellant.

**RT refers to the reporter's transcript.

(a) He answered the question: "6. Describe the actions and behavior in your life which in your opinion most conspicuously demonstrate the consistency and depth of your religious convictions. My ministerial activity, going from door to door making block calls on people holding bible studies and various activities in the ministry." [Ex. 14]

(b) He pointed out that his mother and father were both Jehovah's witnesses. [Ex. 16]

(c) He gave details concerning the parent organization and the congregation of ministers he worked with and from.

Subsequently, he had an Appearance Before Local Board on April 7, 1966. There he informed them [Ex. 25, the local board's version]:

(a) He was considered a minister.

(b) He talked "to people door to door" giving approximately 10 hours per week to this religion.

(c) The clerk filed an account of what was said at this meeting giving the above. He was not told to summarize *his* views of this meeting for a filing in the board's records; although he was advised by the board of other things.

Although the local board had classified him I-A the appeal board classified him in Class I-O. [Ex. 27]

He was thereafter processed for civilian work. [starting Ex. 38]

His reply on the Special Report for Class I-O Registrants, to the question: Describe training, experience, and degree of proficiency in the skills in which you are most interested. "Ministry; I've been a minister since September 28, 1958." [Ex. 40]

His reply was considered "incomplete" and he was eventually ordered to come to an "arbitration" meeting with the local board and a representative of the State Director. [Ex. 46]

The clerk's resume of it is on page 47 of the Exhibit and the second paragraph says: "Selective Service does not deny that you are a minister in the eyes of your church; however, you are not eligible for a IV-D classification as a minister under the Selective Service Regulations because you have not, to date, satisfied your local board that you are teaching and preaching the principles of your church as your vocation. Registrant understood this." [Ex. 47] Another paragraph: "A board member asked subject if he felt he had had a fair hearing and if there was any further information he wished to add. Subject replied his intentions were to enter into the ministry and before he becomes a Pioneer he must meet certain requirements. He feels next month he will have more time to devote to his work. He was advised when he does complete the requirements for a Pioneer to be sure to present evidence to the local board." [Ex. 47]

Due to not having "reached the age group of subject registrant" [Ex. 57] he was not to report for induction until August 8, 1967. [Ex. 61]

He refused to report and was eventually indicted.

2. The oral testimony.

Defendant testified that he had "dedicated my life to the serving of my God" [RT 11/9] and that "I let nothing interfere with the activity in which I must do," [RT 11/14] and that, as an instance, "Well, in September of last year I quit a job which I did have so that I could spend more time in the meeting" [RT 11/20]. Also, as another in-

stance (answering a question from the bench) that he is now self-employed. [RT 17/22]

An objection to further explanatory testimony was made and sustained and defendant made offers of proof, as follows:

"If permitted to testify he would testify that the punishment for a compromise is everlasting death". [RT 12/9]

"If permitted to testify the witness would testify that that means that Jehovah has given those in the truth, the true believers, a promise of everlasting life. In other words, that millions now living would never die." [RT 12/17]

"If he were permitted to answer he would testify that he put in in this non-reportable work other ministerial work amounting to 60 hours a month, such as preparation for his backhall [back calls], study sessions, attending joint services with the other ministers on Sundays." [RT 13/9]

"If permitted to testify the defendant would testify that in addition to belonging to a congregation of ministers he, like all the witnesses, was assigned a congregational [geographical] area, solely his own congregation, and in that area he had the exclusive duty to perform." [RT 13/24 - 14/4]

"If permitted to testify he would testify that his medical history includes the following:

Two ear operations, a broken arm, a hernia, that he is allergic to metal, like wearing a chain around his neck, he reacts to it and he is allergic to detergents." [RT 15/1]

"If permitted to testify, the witness would say it is because his commitment is to be a minister, to serve Jehovah, and to be called away from his meetings or

these other commitments, backhalls [back calls] and all, would be a violation of his religious belief." [RT 17/6]

7. REASONS FOR GRANTING WRIT

The sole question raised by the petition call for a definitive answer to the oft-raised question:

Is there sufficient reason for the practice of this administrative agency to order final physical inspections to its I-A and I-A-O registrants and to not order this given to its I-O registrants?

The question is of national import because several thousand registrants have been, are, and will be in the predicament of petitioner: they are not given fair and equal treatment.

8. ARGUMENT

I

Appellant's Unrebutted Prima Facie Case

Appellant sufficiently showed the local board [Ex. 9], and attempted to clarify and further show in court, that he had worked at various secular activity only to earn a living [RT 9-14]; that his life's work was to be a minister and that he looked forward to the time when he could engage in full time ministry work by getting in a self employment field of work to support himself and thus engage in ministry "full time", that is, putting in enough "field" hours to earn the hierarchy status of "pioneer minister". [RT 9-14]

Although the board rejected his ministerial claim we urge that he had presented a prima facie case for a IV-D classification (minister's status). No contrary evidence,

if any existed, was ever placed in the file. *Dickinson* v. *United States,* 74 S. Ct. 152 (1953), supports our conclusion.

II

Failure of Proof: No Final Physical

The record is clear. The provision for a final physical inspection was not followed, nor was there an equivalent. Sheet No. 33 of the Government Exhibit, the Selective Service file demonstrates that this was not done.

The applicable law requires "equal" treatment to all registrants. The act uses the expression "a system of selection which is fair and just" [§ 1 (c)]. The regulations, on our specific subject, are explicit, as we shall point out.

If the law had failed to specify a physical examination for I-O registrants, giving no reason, there concededly would be an implication that the omission was because it was believed that I-O registrants would be subject to different stresses in civilian work than I-A and I-A-O registrants in the armed services; also, if the law had specified a different type of examination for I-O registrants, we would then have a clear indication of legislative or administrative intent to make a distinction in processing.

But where, as here, we have the identical examination specifically required of Class I-A, Class I-A-O and Class I-O registrants (§ 1623.3, C.F.R.) and where, as here, the defendant has already been given one of these identical armed forces type examinations we have left only the questions of its validity as affected by expiration of time or by the required final "inspection."

The governing regulations are both civilian and military.

Section 1622.1, subsection (b), specified that all registrants are to be processed in the "spirit" of the Act of Congress, namely, equality of privileges. Subsection (d) specifies that none is to be discriminated against because he belongs to a particular class. This certainly covers conscientious objectors. The Act requires that all be done "in accordance with a system of selection which is fair and just." (§ 1 (c)).

Then, with respect to physical examination the procedures set forth are spelled out and *no* distinction is made between registrants ordered to report for civilian work (Class I-O) and registrants ordered to report for induction (Class I-A-O and Class I-A). Subsection 1623.3 says:

"PHYSICAL EXAMINATION

"Physical examination of registrants classified in Class I-A, Class I-A-O, or Class I-O shall be accomplished under the provisions of part 1628, of this chapter."

Next, we see Subsection 1628.10. It has two significant words: "every" with respect to registrants, thus showing that it was intended that every registrant was to be examined, as provided; and "shall" was used, making the procedure mandatory.

"ARMED FORCES PHYSICAL EXAMINATION.

"1628.10 Who Will Be Examined -

Every registrant, before he is ordered to report for induction, or *ordered to perform civilian work* contributing to the maintenance of the national health, safety, or interest, *shall* be given an armed forces physical examination under the provisions of this part, except that a registrant who is a delinquent and a registrant who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination." (Emphasis supplied.)

Since appellant is neither a delinquent nor a volunteer, there can be no question but that Section 1628.10 applied to him.

Finally, § 1660.20 (a) shows specifically that I-O registrants are to be treated like and processed like the I-A registrants, with respect to terminal processing after the physical examination.

> "1660.20 DETERMINATION of Type Civilian Work to Be Performed and Order by the Local Board to Perform Such Work -
>
> (a) When a registrant in Class I-O is found acceptable for service after his armed forces physical examination or when such a registrant has failed to report for or to submit to armed forces physical examination, he shall, within ten days after notice of acceptability is mailed to him by the local board or within ten days after he has failed to report for or submit to armed forces physical examination, submit to the local board three types of civilian work contributing to the maintenance of the national health, safety, or interest as defined in Section 1660.1, which he is qualified to do and which he offers to perform in lieu of induction into the armed forces. If the local board deems any one of these types of work to be appropriate, it will order the registrant to perform such work, but such order shall not be issued prior to the time that the registrant would have been ordered to report for induction if he had not been classified in Class I-O, unless he has volunteered for such work."

Fairness requires equality in the regulations. Even-handed administration of the law by this agency should be its practice, as well as its written procedures. Let us examine the written procedures further. With respect to Order of Call the intent of the top level of the agency is that even-handed procedures be followed. First, note the statement in the 1959 Annual Report, at page 25:

"Both the I-O's and I-A-O's are subject to the same sequence of induction as the I-A's and the regulations concerning extension of liability and the induction of fathers applies equally to them."

The year earlier the 1958 Report, at page 24 phrases it:

"The same sequence for forwarding I-A's for induction applies to the I-O's."

Then, to finalize this top-level, generalized interpretation consider the explicit statement and specific application in the Director's letter of November 28, 1960:

"Reexamination of registrants . . . applies to registrants who are classified in Class I-O"

The form of pre-induction physical examination (Report of Medical Examination Standard Form 88 Bureau of the Budget) contains a stamp for later use, in the following form:

"Physical Inspection, Date. . . . . .

AFEES, LOS ANGELES, CALIFORNIA

No additional defects discovered.

(Fit) (Unfit) for military service."

This form appears at page 33 of the Government's Exhibit. The above-mentioned stamp is not dated and neither the word "fit" nor the word "unfit" has been struck out. Ordinarily, this item subsequently is dated and initialed by the examining physician, and one of those words is lined out. See *Briggs* v. *United States*, 9 Cir., 1968, 397 F.2d 370.

We submit *Briggs* applies.

CONCLUSION

For the reasons given certiorari should be granted and the judgment should be reversed.

Respectfully,

J. B. TIETZ
410 Douglas Building
257 South Spring Street
Los Angeles, California 90012
Attorney for Petitioner

July 12, 1969.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DANNY ROY SHOEMAKER, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

No. 22,912

[May 22, 1969]

Appeal from the United States District Court for the Central District of California.

Before: BARNES, HAMLEY and CARTER, Circuit Judges

HAMLEY, Circuit Judge:

Danny Roy Shoemaker, classified in the selective service system as I-O, failed to report to assigned civilian work as ordered by his local draft board. He was indicted for knowingly failing to perform a duty in violation of Section 12(a) of the Universal Military and Service Act (Act), 62 Stat. 622 (1948), 50 U.S.C. Appendix § 462(a) (1964). Following a non-jury trial he was convicted and given a three year sentence under 18 U.S.C. § 4208(a)(2) (1964). This appeal followed.

Shoemaker argues that he should have been acquitted because he presented a prima facie case for a IV-D ministerial classification and he asserts that no evidence whatsoever appears to rebut the claim. Under a IV-D classification a registrant, as in the case of a I-O classification, is exempt from induction. But one classified IV-D, unlike a I-O registrant, is not subject to a board order requiring him to engage in selected civilian employment for any pe-

riod of time. See section 6(g) of the Act, 62 Stat. 604, 50 U.S.C. Appendix § 456(g) (1964); *Daniels* v. *United States*, 9 Cir., 372 F.2d 407, 409, note 2.

Shoemaker did not defend in the trial court on the ground that he was entitled to a IV-D classification. In the absence of plain error, points not raised in the trial court will not be considered on appeal. *Yeater* v. *United States*, 9 Cir., 397 F.2d 975.

In our opinion there was neither plain error within the meaning of Rule 52(b), Federal Rules of Criminal Procedure, nor was there error of any kind with respect to this IV-D contention.

Examination of Shoemaker's selective service file establishes that he requested a I-O classification, and that is what he received. He did not seek a IV-D classification, indicating at most that he hoped to qualify for such a classification at a later time. He was advised by the local board, in effect, that if and when he expanded his ministerial activity to such an extent that he was entitled to a IV-D classification, he should present evidence thereof to the board. Shoemaker submitted no additional evidence of this kind and did not, formally or informally, request a reopening of his classification after the appeal board classified him I-O.

Apart from Shoemaker's failure to seek a IV-D classification from the agency, there is, in any event, a basis in fact for his I-O classification as distinguished from a IV-D classification.[1] Shoemaker would not have been entitled to a IV-D classification unless the ministry was his vocation. See *Langhorne* v. *United States*, 9 Cir., 394 F.2d

1. A selective service classification may not be overturned for lack of evidentiary support if there is a basis in fact for the classification. *Witmer* v. *United States*, 348 U.S. 375, 381, 383.

129. Shoemaker did not assert, that he worked more than about ten hours a week in furtherance of his ministerial duties. He therefore failed to establish that the ministry was his vocation. See *Daniels* v. *United States*, 9 Cir., 404 F.2d 1049, 1050-1051.

Shoemaker also contends that he should have been acquitted because, when he was ordered to perform civilian work, he was not given or offered a final physical inspection.

Shoemaker did take the regular pre-induction physical examination required of all registrants, and was found physically acceptable. Selective service regulations do not require that registrants classified I-O, as distinguished from registrants classified I-A or I-A-O, be subject to a final physical inspection before being ordered to report for civilian work. *Briggs* v. *United States*, 9 Cir., 397 F.2d 370, relied upon by Shoemaker on this branch of the case, pertains to I-A registrants, and is therefore distinguishable.

The regulations require fair and equal treatment of all those subject to the Act. See section 1(c) of the Act, 62 Stat. 605 (1948), 50 U.S.C. Appendix § 451(g) (1964), and 32 C.F.R. § 1622.1. But there is a rational basis for exempting those classified I-O from the provision for a final physical inspection. Unlike those classified I-A and I-A-O, there is no possibility that registrants classified I-O will be subject to the rigors of military life in a combat zone. In view of this rational basis for exempting I-O registrants from final physical inspections, it cannot be said that Shoemaker was not accorded fair and equal treatment.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from Proceedings of Thursday, June 12, 1969.

Before: BARNES, HAMLEY and CARTER, Circuit Judges.

Order Denying Petition for Rehearing

ON consideration thereof, and by direction of the Court, IT IS ORDERED that the petition of Appellant filed June 5, 1969 and within time allowed therefor, and valid extension thereof, by rule of Court, for a rehearing of above cause be, and hereby is denied.

APPENDIX C

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Universal Military Training and Service Act of 1951, As Amended (50 U.S.C.A. App. § 456 (j)).

(j) Conscientious objectors.—Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely

personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period—equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to noncombatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be ordered by his local

board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed in section 4 (b) such civilian work contributing to the maintenance of the national health, safety or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 339

DANNY ROY SHOEMAKER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1969. A petition for rehearing was denied on June 12, 1969 (Pet. App. A4). The petition for a writ of certiorari was filed on July 14,

1969, and is thus out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, a Selective Service registrant classified I-O (conscientious objector) who had passed an Armed Forces physical examination, had an absolute right to have, in addition, a final physical inspection similar to that given to I-A and I-A-O registrants.

STATEMENT

In a jury-waived trial in the United States District Court for the Central District of California, petitioner was found guilty of refusing to obey an order of his local draft board to report as a I-O (conscientious objector) registrant for civilian employment, in violation of 50 U.S.C. App. 462 (1 R. 2-3, 20). On April 8, 1968, he was sentenced to imprisonment for three years under 18 U.S.C. 4208(a)(2), to be eligible for parole at such time as the Board of Parole may determine (1 R. 25). On appeal the conviction was affirmed.

The evidence contained in petitioner's Selective Service file,[1] introduced as Government Exhibit 1 at the trial, shows that on September 24, 1965, petitioner returned his executed Classification Questionnaire to Local Board No. 136, Riverside, California

[1] We are lodging with the Clerk of this Court a copy of petitioner's Selective Service file, to which we shall refer as "F."

(F. 4). In a Special Form for Conscientious Objectors (Form 150) filed on November 22, 1965, he asked for a I-O classification (F. 13-17). In this form petitioner stated that he devoted approximately 10 hours each week to religious activities of Jehovah's Witnesses (F. 16). On June 16, 1966, petitioner was given the requested I-O classification by a 3-0 vote of the Appeal Board, and on June 22, 1966, he was so notified by mail (F. 11, 27).

On July 25, 1966, petitioner was given an Armed Forces physical examination as required by 32 C.F.R. 1628.10 (F. 30, 32-36). He was found acceptable for military service and a statement of acceptability (Form DD 62) was mailed to him on August 2, 1966 (F. 11, 37).

On August 22, 1966, petitioner filed a Special Report for Class I-O Registrants (Form 152) in which he stated that he was employed as an auto parts warehouse manager, but failed to submit any approved type of civilian work (F. 38-41). On September 1, 1966, the local board mailed to petitioner a letter suggesting three types of available civilian work, to which he did not respond (F. 11, 44, 47). On October 20, 1966, petitioner was ordered to attend a meeting with a representative of the State Director of Selective Service and the local board in an effort to agree on a civilian work assignment (F. 46).

On November 3, 1966, petitioner appeared before the local board and a representative of the State Director. Petitioner stated that he worked 40 hours per week at Jobbers Service Warehouse, and understood that he was not eligible for a IV-D (minister)

classification (F. 47). By a 2-0 vote the local board decided that work at the Los Angeles County Department of Charities was available and appropriate for petitioner (F. 12).

On July 19, 1967, the local board mailed an Order to Report for Civilian Work and Statement of Employer (Form 153) to petitioner, directing him to report to the Los Angeles County Department of Charities for civilian work on August 8, 1967 (F. 12, 65). Petitioner failed to report as ordered (F. 65).

ARGUMENT

The sole question raised (Pet. 2, 7)[2] is whether, as a I-O conscientious objector registrant who had passed an Armed Forces physical examination, petitioner was entitled as a matter of absolute right to

---

[2] Petitioner makes cursory mention, but does not seriously argue, that he should have been granted a IV-D (minister) classification (Pet. 7-8). However, petitioner's Selective Service file shows that he acknowledged that he was not eligible for a IV-D exemption. The file indicates that he was a Magazine Territory Servant and a Book Study Conductor; he was not a Pioneer, the title given to a minister in the Jehovah's witnesses (F. 47-48). He spent only about ten hours per week in religious activities, held a full time secular job, and consequently did not make the ministry his vocation as a "regular or duly ordained minister of religion" within the meaning of 50 U.S.C. App. 466(g)(3). *Langhorne* v. *United States*, 394 F. 2d 129 (C.A. 9); *Gray* v. *United States*, 391 F. 2d 270 (C.A. 9); *Badger* v. *United States*, 322 F. 2d 902 (C.A. 9), certiorari denied, 376 U.S. 914. *Dickinson* v. *United States*, 346 U.S. 389, on which petitioner purports to rely (Pet. 8), to the contrary provides substantial support for the conclusion that he was not entitled to a ministerial exemption (see 346 U.S. at 394-395).

have an additional physical inspection, similar to that given to I-A and I-A-O registrants, prior to reporting for his assigned civilian employment.

As a I-O registrant petitioner was given an Armed Forces physical examination in accordance with 32 C.F.R. 1628.10 (see Pet. 9), was found qualified for induction, and was mailed a statement of acceptability (F. 11, 30, 32-37). That was all that he was entitled to under the pertinent regulations. He had no absolute right to a final physical inspection prior to the date he was ordered to report for civilian work. No provision in either the Selective Service regulations or in the Army regulations gives a I-O registrant a right to such an additional examination. *Briggs* v. *United States*, 397 F. 2d 370 (C.A. 9), is not helpful to petitioner since the Army regulation there involved[3] was interpreted as entitling a I-A (not a I-O) registrant to a final physical inspection.

We recognize that the governing statute and regulations (see particularly 50 U.S.C. App. 451(c) and 32 C.F.R. 1622.1) require fair and equal treatment for all registrants. And, as petitioner notes (Pet. 9), those classified I-O are given the same physical examination as I-A and I-A-O registrants (see 32 C.F.R. 1623.3, 1628.10). We submit, however, that the court below was correct in concluding that (Pet. App. A3)

> * * * there is a rational basis for exempting those classified I-O from the provision for a final physical inspection. Unlike those classified I-A

---

[3] Army Regulation 601-270, Ch. 3, Sec. III, para. 69, at 3-23 (1965).

> and I-A-O, there is no possibility that registrants classified I-O will be subject to the rigors of military life in a combat zone. In view of this rational basis for exempting I-O registrants from final physical inspections, it cannot be said that [petitioner] was not accorded fair and equal treatment.

Moreover, it has consistently been held that the regulations are satisfied once a conscientious objector has been given an Armed Forces physical examination and has been found acceptable. See *United States* v. *Coon*, 153 F. Supp. 96, 102-103 (D. Utah), appeal dismissed, 249 F. 2d 320 (C.A. 10); *United States* v. *Manns*, 232 F. 2d 709, 712 (C.A. 7); *Miller* v. *United States*, 169 F. 2d 865, 866-867 (C.A. 6).

Finally, it is also significant that petitioner has made no showing that he was suffering from any medical disability incurred after the time of his original physical examination which would have authorized his disqualification, even if he had been granted a final physical inspection.[4] Accordingly, no possible prejudice to petitioner has been demonstrated.

---

[4] It was an immaterial clerical oversight that the medical report of petitioner's examination (F. 33) did not bear a stamp to the effect that no additional defects had been discovered and did not show that either the word "fit" or "unfit" had been stricken (see Pet. 11). It was undisputed that petitioner had passed the Armed Forces physical examination, had been found qualified for induction, and had been mailed a statement of acceptability (F. 11, 30, 32-37).

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

JEROME M. FEIT,
ROBERT G. MAYSACK,
Attorneys.

AUGUST 1969.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1969 360320 107